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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1157

RICHARD E. GERSTEIN and ROBERT L. SHEVIN,
Appellants,

v.

NANCY COE, PATRICIA NOE, DR. LYNN P. CARMICHAEL, and all others similarly situated,
Appellees.

On Appeal from the United States District Court for the Southern District of Florida

MOTION TO AFFIRM OR DISMISS, AND BRIEF

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INDEX

Page

Statement of the Case 1

ARGUMENT:

I. The Court Lacks Jurisdiction Over this Appeal Under 28 U.S.C. § 1253, Because Injunctive Relief Was Not Granted Against Or Denied to These Appellants 2

II. The Court Has Jurisdiction to Treat the Appeal as a Rule 20 Petition for Writ of Certiorari Before Judgment in the Court of Appeals, Grant the Writ, and Affirm 3

III. The Spousal and Parental Consent Clauses of the Florida Abortion Law, F.S.A. § 458.22(3) (a), (b), Are So Plainly Unconstitutional and Overbroad In Light of *Roe* v. *Wade* and *Doe* v. *Bolton* that Summary Affirmance is Appropriate 4

Conclusions 13

INDEX OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

United States Constitution—

Amendment XIV ..... passim

STATUTES AND RULES:

15A Fla Stat. Ann. § 458.22 ..... passim

Supreme Court Rule 20 ..... passim

U.S. Code, tit. 28, § 1253 ..... passim

U.S. Code, tit. 28, § 1254 4

U.S. Code, tit. 28, § 2101 4

Page

CASES:

Bolton v. Doe, 402 U.S. 936 (1971) (per curiam) .....
Brown v. Board of Education, 347 U.S. 483 (1954) ....
Burroughs v. Crichton, 48 App. D.C. 596 (1919) .....
Coe v. D.C. General Hospital, Civ. No. 1477-71 (D.D.C. June 5, 1972) (unreported) .....
Doe v. Bolton, 410 U.S. 179 (1973) .....passim
Doe v. Rampton, 366 F.Supp. 189 (D. Utah 1973) 5, 6,
Doremus v. Board of Education, 342 U.S. 429 (1952) ..
Eisenstadt v. Baird, 405 U.S. 438 (1972) .....
Engel v. Vitale, 370 U.S. 421 (1962) .....
Gault, In re, 387 U.S. 1 (1967) .....
Harris v. Lee, 1 P. Wms. 482, 24 E.R. 482 (Ch. 1718) ..
Herko v. Uviller, 203 Misc. 108, 114 N.Y.S.2d 618 (Sup. Ct. 1952) .....
Jones v. Smith, 278 So.2d 339 (Fla. D.Ct. App. 1973), petition for cert. filed, 42 U.S.L.W. 3434 (U.S. Jan. 21, 1974) (No. 73-1133) .....
Kritzer v. Citron, 101 Cal. App. 2d 33, 224 P.2d 808 (D. Ct. App. 1950) .....
Levy v. Louisiana, 391 U.S. 68 (1968) .....
Maryland v. Housekeeper, 170 Md. 162, 16 Atl. 382 (1888) .....
McCann v. Babbitz, 400 U.S. 1 (1970) (per curiam) ...
M'Clallen v. Adams, 19 Pick. (Mass.) 333 (1837) .....
Mitchell v. Donovan, 398 U.S. 427 (1970) .....
O'Beirne v. Superior Court, 1 Civ. 25174 (Cal. Sup. Ct. 1967) .....
Prince v. Massachusetts, 321 U.S. 158 (1944) .....
Roe v. Wade, 410 U.S. 113 (1973) .....passim
Rosenberg v. Feigin, 119 Cal. App. 2d 783, 260 P.2d 143 (D. Ct. App. 1953) .....
School District of Abington v. Schempp, 374 U.S. 203 (1963) .....
Sheldon v. Sheldon, 146 App. Div. 430, 131 N.Y.S. 291 (2d Dep't 1911) .....
Smith, In re, 16 Md. App. 209, 295 A.2d 238 (Ct. Spec. App. 1972) .....
Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) .....
Turner v. City of Memphis, 369 U.S. 350 (1962) (per curiam) .....
Winship, In re, 397 U.S. 358 (1970) .....

Page

OTHER AUTHORITIES:

American College of Obstetricians and Gynecologists, Statement on Teenage Pregnancy (1970) 9

Current Population Reports, Series P-23, No. 36, U.S. Bureau of the Census (1971) 9

Cutright, The Teenage Sexual Revolution and the Myth of An Abstinent Past, 4 Family Planning Perspectives No. 1, at 24 (1972) 9

Family Planning/Population Reporter (Dec. 1973) 5,8

Menken, Health and Social Consequences of Teenage Childbearing, 4 Family Planning Perspectives No. 3, at 45 (July 1972) 9

Model Penal Code 5, 8

Pilpel & Zuckerman, Abortion and the Rights of Minors, 23 W. Res. L. Rev. 779 (1972) 8

Tietze & Lewit, Joint Program For the Study of Abortion (JPSA), 3 Studies In Family Planning 97 (June 1972) 5, 9

Uniform Abortion Act 5, 8

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Appellees.

On Appeal from the United States District Court for the Southern District of Florida

MOTION TO AFFIRM OR DISMISS

Appellees respectfully move the Court to treat the Jurisdictional Statement as a Rule 20 Petition for Writ of Certiorari Before Judgment in the Court of Appeals, grant the writ, and affirm, or in the alternative, to dismiss the appeal for want of jurisdiction under 28 U.S.C. § 1253.

Respectfully submitted,

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IN THE

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Appellees.

On Appeal from the United States District Court for the Southern District of Florida

BRIEF IN SUPPORT OF MOTION TO AFFIRM OR DISMISS

Appellees respectfully submit this brief in support of the motion to affirm or dismiss.

STATEMENT OF THE CASE

In four respects Appellees must supplement the statement of facts submitted by Appellants.

First, whether the three-judge district court impliedly "recommended" (J.S., at 1, 10a) that Appellants not enforce unconstitutional provisions of the Florida abortion laws or not, that court denied Ap-

pellee's requests for injunctive relief, and even dismissed from the case plaintiffs Paula Poe, Rita Roe, and Pamela Harris. The assumption by the district court that Appellants would recognize the declaratory judgment was the rationale for denying injunctive relief. It was not the grant, but denial of an injunction.

Second, Appellants have appealed only two parts of the declaratory judgment, namely the parental and spouse consent requirements. The judgment, however, invalidated further provisions, which are involved in an appeal to this Court by Appellees, and as to which injunctive relief was also denied.

Third, under JURISDICTION at J.S., p. 2, Appellants state: "Plaintiffs filed their corrected notice of appeal from the denial of injunctive relief on December 10, 1973." The record shows that Plaintiffs' notice of appeal was filed December 21, 1973, not the 10th.

Finally, Appellants' Jurisdictional Statement omits the presence of three Appellees who were dismissed without opinion from the case at preliminary stages—Paula Poe, Rita Roe, and Pamela Harris. The judgment in this case was not final as to any party until denial of rehearing, and these Appellees are all a part of the appeal.

ARGUMENT

I.

The Court Lacks Jurisdiction over this Appeal under 28 U.S.C. § 1253, Because Injunctive Relief Was Not Granted Against or Denied to These Appellants.

The three-judge district court invalidated certain provisions of the Florida abortion law, but "[found] it unnecessary to provide plaintiffs injunctive relief."

(J.S., at 10a). No injunction was entered against Appellants from which to appeal. Only the Appellees were adversely affected by the denial of an injunction. Accordingly, Appellants may not properly appeal here under 28 U.S.C. § 1253. *Bolton* v. *Doe*, 402 U.S. 936 (1971) (per curiam); *McCann* v. *Babbitz*, 400 U.S 1 (1970) (per curiam); *Public Service Comm'n* v. *Brashear Freight Lines*, 306 U.S. 204 (1939) (per curiam). No direct appeal under 28 U.S.C. § 1253 lies from an adverse declaratory judgment. *Mitchell* v. *Donovan*, 398 U.S. 427 (1970). Cases cited by Appellants all involve proper direct appeals by parties adversely affected by the granting or denial of an injunction. This appeal, however, is not such a case.

It follows that the appeal *per se* must be dismissed for want of jurisdiction under 28 U.S.C. § 1253.

II.

The Court Has Jurisdiction To Treat the Appeal as a Rule 20 Petition for Writ of Certiorari before Judgment in the Court of Appeals. Grant the Writ, and Affirm.

The present case involves a bifurcated lower court disposition whereby Plaintiff-Appellees were granted a declaratory judgment, but denied injunctive relief. Under such circumstances, *Roe* v. *Wade*, 410 U.S 113, 123 (1973), recommended for Defendants a Rule 20 petition for certiorari before judgment in the Court of Appeals. Appellants recognize this in a footnote, J.S. at 2.

Turner v. *City of Memphis*, 369 U.S. 350 (1962) (per curiam), took the Rule 20 course. A unanimous Court "treat[ed] appellant's jurisdictional statement as a petition for writ of certiorari prior to judgment in the

Court of Appeals . . . " citing 28 U.S.C. §§ 1254(1), 2101(e).

Appellees recognize the public importance and recurring nature of the questions presented by this appeal. Accordingly, Appellees have no objection to Rule 20 treatment. However, as shall appear, the questions presented appear suitable for summary disposition in light of *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

III.

The Spousal and Parental Consent Clauses of the Florida Abortion Law, F.S.A. § 458.22(3) (a), (b) Are So Plainly Unconstitutional and Overbroad in Light of Roe v. Wade and Doe v. Bolton that Summary Affirmance Is Appropriate.

The present appeal involves two provisions of the Florida Abortion Law, characterized by the three-judge District Court as the "spousal or parental consent" requirements. 15A FLA. STAT. ANN. § 458.22, at 38 (Cum. Pkt. Pt. 1973). These may be treated separately.

A.

The "Spousal Consent Clause" of the Florida Abortion Law Invades a Pregnant Married Woman's Individual Right of Privacy in Violation of the Due Process Clause of the Fourteenth Amendment.

Neither *Roe* nor *Doe*, *supra*, involved an abortion law purporting to bestow veto rights on the pregnant woman's spouse. *Roe*, in fact, expressly declined to address the issue of "the father's rights, if any. . ." 410 U.S. at 165, n.67.

The issue, however, is squarely presented by this appeal. 15A FLA. STAT. ANN. § 458.22(3)(a), at 38

(Cum. Pkt. Pt. 1973), expressly provides that a married woman seeking a therapeutic abortion must provide the physician with "written consent of her husband, unless the husband is voluntarily living apart from the wife" or in case of life-threatening emergency. *Id.* § 458.22(3)(*e*), at 38. This written consent, moreover, amounts to a veto, because the husband may withhold consent for any reason, for reasons forbidden to the State by *Roe* v. *Wade*, or for no reason at all. "[N]o other voluntary medical or surgical procedure for which [Florida] requires confirmation by . . ." the husband can be found. *Cf. Doe* v. *Bolton*, 410 U.S. 179, 199 (1973) (invalidating requirement that two other physicians approve an abortion). No requirement of spouse consent was contained in the Model Penal Code or Uniform Abortion Act proposals. *Doe* v. *Bolton*, *supra*, 410 U.S. at 194.

At least fifteen States, however, require spouse consent by statute for therapeutic abortion under some circumstances amounting to a veto.[1] Nationwide studies on abortion show that substantial numbers of women are affected, in that at least 29.9% of abortion patients are currently married.[2] Hospitals and clinics, of course, may well impose a spouse consent requirement as an added element of presumed self-protection, regardless of local law.

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[1] These are Alaska, Arkansas, Florida, Colorado, Idaho, Indiana, Louisiana, Nebraska, Nevada, Oregon, South Carolina, South Dakota, Virginia, Utah, and Washington. *See* 2 Family Planning/Population Reporter 150-53 (Dec. 1973); *see also* Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973) (three-judge court) (invalidating entire Utah statute).

[2] *See* Tietze & Lewit, *Joint Program for the Study of Abortion*, 3 Studies in Family Planning 97, 100, Table 1 (June 1972).

Case law provides some guidance.[3] The decision of this Court in *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) favors Appellees in stating:

> "If the right of privacy means anything, it is the right of the *individual*, married or single, to be

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[3] The only three-judge federal court decisions ruling upon spouse consent provisions found them unconstitutional in light of Roe v. Wade, supra, and Doe v. Bolton, supra. These are the present case and Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973). *See also* Coe v. D.C. General Hosp., Civ. No. 1477-71 (D.D.C. June 5, 1972) (unreported) (spouse consent not required in D.C.).

Periodic injunctive actions to prevent an abortion have uniformly rejected any paternal interest. *See* Jones v. Smith, 278 So.2d 339 (Fla. D. Ct. App. 1973), *petition for cert. filed*, 42 U.S.L.W. 3434 (U.S. Jan. 1, 1974) (No. 73-1133); O'Beirne v. Superior Court, 1 Civ. 25174 (Cal. Sup. Ct. Dec. 6, 1967) (unreported).

A number of tort, malpractice, and contract actions appear to hold that a married woman may consent for herself alone when seeking medical or surgical care. *See* Rosenberg v. Feigin, 119 Cal. App. 2d 783, 260 P.2d 143 (D. Ct. App. 1953); Herko v. Uviller, 203 Misc. 108, 114 N.Y.S.2d 618 (Sup. Ct. 1952); Kritzer v. Citron, 101 Cal. App. 2d 33, 224 P.2d 808 (D. Ct. App. 1950); Burroughs v. Crichton, 48 App. D.C. 596 (1919); Maryland v. Housekeeper, 170 Md. 162, 16 Atl. 382 (1888); M'Clallen v. Adams, 19 Pick. (Mass.) 333 (1837).

Early common law cases often suggest that medical care is a necessity for which a husband is obligated to pay. These date as far back as Harris v. Lee, 1 P. Wms. 482, 24 E.R. 482 (Ch. 1718).

A bizarre variation is an action for separation. Sheldon v. Sheldon, 146 App. Div. 430, 131 N.Y.S. 291 (2d Dep't 1911). Dr. Sheldon had apparently anesthetized his wife each time she became pregnant and aborted her, thereby depriving her "of the maternal joy so highly prized by every good woman . . . ." She was granted the requested separation.

free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (Emphasis in Opinion).

Similarly, the reasoning of *Roe* v. *Wade* hardly suggests that the important rights recognized there could be swept away by a state law allowing third party veto over exercise of the right. As *Roe* stated:

> "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically or otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation." 410 U.S. at 153.

It is inconceivable that the Court intended to leave married women and minors wholly unprotected by the *Roe* and *Doe* decisions. Yet, that is the reach of Appellants' position. Moreover, to bestow a veto over the abortion decision is to allow the third party to invoke arbitrary and irrational considerations expressly forbidden to the State itself. This is inconsistent with everything *Roe* stands for.

B.

The "Parental Consent Clause" of the Florida Abortion Law Invades a Pregnant Minor Woman's Individual Right of Privacy in Violation of the Due Process Clause of the Fourteenth Amendment.

Roe and *Doe* also declined to express any view on the constitutionality of state laws bestowing veto rights on the parents of a pregnant minor. 410 U.S. at 165, n.67.

The parental consent issue, however, is squarely presented here. 15A FLA. STAT. ANN. § 458.22(3)(b), at 38 (Cum. Pkt. Pt. 1973), expressly requires the physician to obtain, "[i]f the pregnant woman is under eighteen years of age and unmarried . . . the written consent of a parent, custodian, or legal guardian. . .." except in case of life-threatening emergency. *Id.* § 458.22(3)(c), at 38. This third party consent, moreover, sanctions a veto, because the parents may deny permission for any reason, for reasons denied legitimacy by *Roe* and *Doe*, or for no reason at all. No parental consent provision was embodied in the Model Penal Code or Uniform Abortion Act proposals cited in *Doe* v. *Bolton*, *supra*, 410 U.S. at 194.

At least eighteen States, however, require parental consent by statute for therapeutic abortion in the case of all or some minors, and in circumstances granting a virtual absolute veto.[4] Such provisions have serious

[4] These are Alaska, Arkansas, Florida, Colorado, Delaware, Indiana, Louisiana, Missouri, Nebraska, Nevada, New Mexico, Oregon, South Carolina, South Dakota, Texas, Virginia, Utah, and Washington. *See*, Family Planning/Population Reporter 150-53 (Dec. 1973); Pilpel & Zuckerman, *Abortion and the Rights of Minors*, 23 W. Res. L. Rev. 779 (1972); *see also* Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973).

impact. As many as 24% of abortion patients are less than 20 years of age.[5] In addition to statutes, minors must also contend with restrictive hospital and clinic rules not necessarily required by statute or case law.

The language and rationale of *Roe* v. *Wade*, 410 U.S. 113 (1973), apply with equal or greater force to protect the right of privacy of a pregnant minor from parental veto. Unwanted pregnancy in a minor can be a far greater threat to physical and mental health than in the case of a healthy unmarried adult. *See* Menken, *Health and Social Consequences of Teenage Childbearing*, 4 Family Planning Perspectives No. 3, at 45 (July 1972). Moreover, illegitimate births among young women in the 15 to 19 age range more than doubled between 1940 and 1968.[6] Teenagers gave birth to an estimated 180,000 illegitimate children during the year 1970. *U.S. Bureau of the Census, Current Population Reports*, Series P-23, No. 36 (1971). However,

> "[t]hese figures do not take into account the number of premarital pregnancies which have forced early marriages. . . . In one state in which figures are available, 48 percent of teenage marriages involved a premarital pregnancy. Approximately one-half of these marriages end in divorce within the first four years." *Statement on Teenage Pregnancy, American College of Obstetricians and Gynecologists* (Apr. 10, 1970).

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[5] *See* Tietze & Lewit, *supra* note 2, at 100, Table 1.

[6] Cutright, *The Teenage Sexual Revolution and the Myth of An Abstinent Past*, 4 Family Planning Perspectives No. 1, at 24 (1972).

By its terms the Fourteenth Amendment embraces the rights of minors as much as adults. The Amendment, for example, defines citizenship as being conferred upon those "born or naturalized" in the United States, not just adults.

Case law, also, repeatedly applies the First, Fourth, Fifth, Sixth and Fourteenth Amendments, and numerous clauses therein, to secure rights for minors.

The First Amendment guarantee against laws "respecting an establishment of religion" has been successfully invoked by school children to bar compulsory prayers. *See Engel* v. *Vitale*, 370 U.S. 421 (1962). Neither *Engel* nor the many other school-prayer and Bible-verse decisions suggest that the minor's right to be protected from government imposed religion could be waived by a parent. Indeed, the presence of a minor with standing to sue was held absolutely indispensable to a similar prayer case in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952). *See also School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

First Amendment free speech rights have similarly been held available to minors and school children. *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). A majority of the Court in *Tinker* held:

> "School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect. . . ." (393 U.S. at 511).

In no way did the Court suggest that the First Amendment protected only those students whose parents shared their views.

Brown v. *Board of Education*, 347 U.S. 483 (1954), also spawned a line of decisions barring discrimination against minors, not only in access to education, but in numerous respects where neither race nor education was an issue. Indeed, fourteen years after *Brown*, the Court was to hold:

> "[I]llegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Levy* v. *Louisiana*, 391 U.S. 68, 70 (1968).

If illegitimate children, regardless of age, are "persons" under the Fourteenth Amendment, *a fortiori*, unmarried pregnant minors have comparable constitutional status.

In virtually all spheres of litigation the minor person has received the protections and benefits of the Bill of Rights. Nowhere has this been more consistently the case than with respect to the rights of minors accused of juvenile offenses.

In re Gault, 387 U.S. 1 (1967), was the fountainhead of juvenile rights in offender proceedings. The case pointedly held:

> "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." (387 U.S. at 13).

Gault applied the procedural constitutional rights of notice, confrontation, cross-examination, and the privilege against self-incrimination to minors in juvenile proceedings. The Court has repeatedly reaffirmed *Gault*, most recently including the right to insist that proof be beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

In sum, a substantial body of case law acknowledges the fact that the Bill of Rights is not marked "adults only." With respect to freedom of religion, free speech, freedom from invidious discrimination, and fundamental fairness in juvenile offender proceedings, a minor is protected by the Bill of Rights, and not excluded as a "non-person."

The cases and language of the Constitution support this approach to the protection of fundamental personal rights in general. Indeed, the reasons behind the Bill of Rights have very little to do with chronological age. Similarly, a young woman's need for medical care to terminate pregnancy is also wholly unrelated to age.

State authority to enforce the obedience of minors to parents is a practice which must be challenged in this area. If one parent can veto an abortion for any reason, another parent may attempt to compel an abortion. The latter was the factual setting of *In re Smith*, 16 Md. App. 209, 295 A.2d 238 (Ct. Spec. App. 1972), where an appellate court in emergency session prevented a sheriff from taking a young woman to the hospital for a forced abortion insisted upon by her mother.

CONCLUSIONS

For the reasons set out, the Court should dismiss the appeal, but grant a petition for writ of certiorari under Rule 20 and affirm the declaratory judgment rendered below.

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